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No.

In the Supreme Court of the United States

October Term, 1985

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, *et al.*,
Petitioners,

vs.

WILLIAM F. MURPHY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit incorrectly affirmed the district court decision to award attorney fees without considering any factors in calculating the fees beyond the hours submitted and reasonable rate, in direct conflict with decisions in every other circuit and with prior decisions of this Court, as interpreted by a majority of the circuits?

2. Whether the Sixth Circuit's attorney fees decision, relying on statutory fee cases, disregarded the essential differences between fees based on the common benefit rationale and statutory fee awards, and thus conflicts with this Court's prior common benefit opinions?

3. Whether the Sixth Circuit erroneously affirmed the district court's abuse of discretion in direct conflict with cases in every other circuit and with prior decisions of this Court by awarding over $133,000 in attorney fees under the common benefit rationale, although by contract the plaintiff owed no fees to his private attorney or to his Legal Aid attorney, resulting in the plaintiff incurring no costs of the litigation to be spread proportionately amongst the membership of the class allegedly benefitting from the litigation?

LIST OF PARTIES TO PROCEEDINGS BELOW

WILLIAM F. MURPHY: *Plaintiff-Appellee/Cross-Appellant*

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18, JOHN POSSEHL, CHARLES RUTHERFORD, JOHN FRANK, FRANK MILLER, and S. A. BLAIR: *Defendants-Appellants/Cross-Appellees*

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Petitioners, International Union of Operating Engineers, Local 18 respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 30, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is reprinted at A-466 of the Appendix to this Petition. The opinion of the United States District Court for the Northern District of Ohio, dated July 18, 1978, is reported at 99 L.R.R.M. 2074 (N.D. Ohio 1978) and is reprinted at A-1 of the Appendix to this Petition. The October 14, 1982 opinion of the United States District Court is unreported and is reprinted at A-377 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by this Petition was rendered and entered on September 30, 1985. This Petition for Certiorari is filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Because of their length, the following statutes are set forth verbatim in the Appendix, A-504-A-505:

29 U.S.C. §§ 411(a)(1), (2), (5)

29 U.S.C. § 412

42 U.S.C. § 1988

STATEMENT OF THE CASE

This action was initiated by William Murphy ["Murphy"] against Local 18 of the International Union of Operating Engineers ["Local 18" or "Union"], President Charles Rutherford, Business Manager John Possehl, Vice-President John Frank, Conductor Frank Miller and the Chairman of the Election Committee, S. S. Blair. In his original Complaint filed in December, 1973, Murphy alleged that the defendants had violated his rights under Title I of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411 ["LMRDA"].

At the conclusion of the plaintiff's case, the plaintiff successfully moved to amend his complaint adding allegations under the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§ 1981 and 1985(3). At the end of trial, Murphy was further permitted to amend his Complaint, adding a number of claims under §§ 481(c), 501, 529, 530 and 523 of the LMRDA, two claims under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185 ["LMRA"], and a number of pendent claims under Ohio law.

On July 18, 1978, the district court issued findings of fact and conclusions of law. The court entered judgment in favor of defendants Rutherford, Blair and Miller. The court also dismissed most of the allegations against defendants Local 18, Possehl and Frank, while imposing liability under some portions of the Amended Complaint. On October 14, 1982, the court issued a supplemental decision modifying its earlier judgment concerning punitive damages and deciding various motions for costs and attorney's fees.

A. July 18, 1978 Decision Of The District Court

The district court held that Local 18 did not violate § 411 (a) (1) or (5) of the LMRDA, stating that Murphy had failed to show improper refusal on behalf of Local 18 to accept his phone service as a substitute in the referral process; failed to show that the Union improperly refused him access to referral lists; failed to prove discrimination in the right to vote, to nominate candidates, or to speak at meetings; and failed to show that the Union improperly denied him access to the Union's newsletter, the *Buckeye Engineer*.

Murphy also failed to show that the Union improperly conducted elections. Murphy's allegations in this regard, characterized as § 411 violations, were rejected by the district court even when considering those charges properly before the court under § 481(c).[1] Similarly, Murphy's claims under §§ 501 and 530 of the LMRDA were deemed to be beyond the jurisdiction of the court. The court further rejected Murphy's claim that he had a right to copy membership lists.

At the heart of Murphy's charges was the denial of a "full and fair hearing" guaranteed by § 411(a)(5)(c) of the LMRDA, occurring during his intra-Union trial for theft of an election control list. The district court rejected Murphy's claims that the trial and subsequent suspension were contrived to preclude Murphy's candidacy for Union office and rejected each of Murphy's challenges to the pretrial procedures and rulings connected with such trial.

The district court characterized Murphy's intra-Union trial as "orderly and efficient" rejecting Murphy's claims

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1. Some of these allegations fell within the exclusive jurisdiction of the Department of Labor.

of evidentiary impropriety and found that the sentence imposed was not excessive. Although the court found that the defendants had "manipulated" the composition of Murphy's jury, it concluded that § 529 of the LMRDA had not been violated.

Despite the Sixth Circuit Court of Appeals' previous rulings to the contrary in *IUOE, Local 18 v. NLRB*, 496 F.2d 1308 (6th Cir. 1974) and *IUOE, Local 18 v. NLRB*, 555 F.2d 552 (6th Cir. 1977), the district court agreed with Murphy's contentions that the Union had unlawfully refused to re-register Murphy's work card and that the Union had unlawfully failed to reinstate Murphy at the end of his suspension.

With regard to Murphy's civil rights claims, the district court rejected Murphy's claimed violation of 42 U.S.C. § 1981, while it held defendants Frank and Possehl jointly and severally liable for conspiring to violate Murphy's civil rights under 42 U.S.C. § 1985(3) and held Local 18 "vicariously liable" for the "conspiracy".

The district court rejected the bulk of Murphy's pendent claims against the defendants under Ohio law, including claims of abuse of process and defamation. The court further ruled that Murphy's allegations of malicious interference with contractual and associational rights were included within his claim for breach of contract. Although the district court held that there was no breach of contract in Murphy's trial for theft of the election control list, the court did find a breach of contract with Murphy through discrimination in employment referrals. The court also found against the defendants for assault and battery and civil conspiracy. Although the court found Murphy's claims under § 501 to be improper, it entered but then vacated judgment against Possehl for violation of his common law fiduciary duties.

On the basis of the foregoing, the district court awarded Murphy compensatory damages in the amount of $10,000, as well as punitive damages in the amounts of $30,000 against Possehl, $20,000 against Frank, and $150,000 against Local 18. The court then vacated the award against Possehl, who had passed away subsequent to the end of trial but prior to the entry of judgment. The district court deferred execution of the judgment and offered to consider vacating the punitives against Frank and Local 18, provided that Frank agree not to be a Union officer for five years and provided that Local 18 submit a plan to the court to maintain open and accessible channels of communication to all candidates for Union office.

The court also ordered injunctive relief against the defendants, while deferring its ruling on the propriety of attorney fees. Three out of four of the court's rulings with respect to injunctive relief were limited to Murphy himself, and did not benefit other members. These included the obligation to expunge Murphy's record, to refrain from interfering with Murphy's exercise of LMRDA rights, and to refrain from discriminating against Murphy in the referral system.[2]

B. October 14, 1982 Post-Judgment Memorandum Opinion And Order

In its post-judgment opinion, the district court vacated its punitive damage award against Frank because he agreed not to seek or hold Union office for five years. The punitive damage award against Local 18 was also vacated upon the Union's voluntary submission of a plan to make its decision-making and referrals more democratic

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2. *Murphy v. International Union of Operating Engineers, Local 18, et al.*, 99 L.R.R.M. 2074 (N.D. Ohio 1978), A-1.

in nature. The court also denied Murphy's motion to tax as costs the fees of his expert witness. The court further awarded attorney fees against Local 18 based on the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 and based on the "bad faith" and "common benefit" exceptions to the American Rule on attorney fees. The fees were in the amount totaling $33,107.50 for work performed by Legal Aid attorney Stege and $100,232.50 for work performed by private attorney Ruben. The court denied Murphy's request to have his expert witness fees taxed as costs, taxing $1,821.46 to defendants for other costs.

C. Appeal And Cross-Appeal To The Sixth Circuit

Local 18 appealed the district court's judgment, arguing that the court erroneously found common law and statutory violations. The Union also challenged as erroneous the award of attorney fees and the excessiveness of the amount awarded.

Murphy cross-appealed, claiming that the district court erroneously vacated its award of punitive damages and should have taxed his expert witness fees as costs. Murphy further challenged the district court's determination that the Union's refusal to provide access to the Union newspaper was in violation of 29 U.S.C. § 411.

The Sixth Circuit Court of Appeals, on September 30, 1985, affirmed the outcome of the district court's opinion, although on different bases. The appeals court agreed with the Union that Murphy's § 1985(3) claim was barred by the *en banc* decision in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985). Regarding the other claims raised in Murphy's Amended Complaint,

under §§ 481(c), 501, 523, 529 and 530 of the LMRDA and § 185 of the LMRA, the Sixth Circuit found meritorious the claims made by the Union, but determined that the district court opinion could be affirmed solely upon findings of liability under §§ 411 and 412 of the LMRDA. Because the appeals court rejected Murphy's § 1985(3) cause of action, attorney fees could not be justified under 42 U.S.C. § 1988. The court also determined that Murphy was not entitled to fees under the "bad faith" theory, but found the "common benefit" theory to apply. The court further held that the award of attorney fees was not excessive.

The Sixth Circuit denied each of Murphy's claims made on cross-appeal.

Petitioner Union now seeks review before this Court of the September 30, 1985 judgment of the Sixth Circuit Court of Appeals, with regard to the award of attorney fees and the excessiveness of the amount awarded.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

A decision by the Supreme Court is necessary to correct a substantial conflict among the circuits concerning the application of the common benefit equitable exception to the American Rule on attorney fees, as well as the factors to be applied in conferring a fee award under a non-punitive equitable exception. This case addresses an additional facet of the attorney fees calculation questions to be considered by this Court in *City of Riverside v. Rivera*, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224, and *City of McKeesport v. Cunningham*, 753 F.2d

262 (3d Cir. 1985), *petition for cert. filed*, No. 84-1793. The conflicts and errors created by the Sixth Circuit in the present case are summarized below.

First, the Sixth Circuit erroneously failed to consider any factors beyond the hours submitted and a reasonable rate in computing fees awarded under the "common benefit" rationale, in direct conflict with a majority of the circuits. Furthermore, the Sixth Circuit has construed this Court's decisions in the statutory fee cases *Hensley v. Eckerhart*, 461 U.S. 424 (1983) and *Blum v. Stenson*, ... U.S. ....., 79 L. Ed. 2d 891, 104 S. Ct. ..... (1984), as warranting its failure to consider such essential factors in computing fees awarded under the "common benefit" rationale and as failing to disapprove of a similar approach taken in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), another statutory fee case. This position conflicts with prior decisions of this Supreme Court, as interpreted by a majority of the other circuits.

Second, in awarding attorney fees under the "common benefit" theory the Sixth Circuit failed to consider that "common benefit" awards subsume a rationale distinct from that present in statutory fee cases, thus requiring an additional determination or consideration as to the proportionate share of the costs incurred by the plaintiff in obtaining the benefit conferred. While this Court has addressed certain aspects of calculating statutory fee awards pursuant to 42 U.S.C. § 1988, and recently agreed to determine whether additional factors should be considered in *City of Riverside v. Rivera*,[3]

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3. In *Rivera*, this Court will consider the disproportionality of the attorney fee award as compared to the plaintiff's recovery.

(Continued on following page)

this Court has not addressed whether the same factors must be applied in common benefit cases.

Third, the Sixth Circuit's decision that there could be an award of over $100,000 in attorney fees for work performed by the plaintiff's private attorney and over $33,000 in fees for work performed by his Legal Aid attorney, under the "common benefit" equitable exception to the American Rule, although by agreement the plaintiff owed no fees to his private attorney or to his Legal Aid attorney, is contrary to decisions in every other circuit and to this Court's decisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 1 (1973); and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

II. THE SIXTH CIRCUIT INCORRECTLY AFFIRMED THE DISTRICT COURT DECISION TO AWARD ATTORNEY FEES WITHOUT CONSIDERING ANY FACTORS IN CALCULATING THE FEES BEYOND THE HOURS SUBMITTED AND REASONABLE RATE, IN DIRECT CONFLICT WITH DECISIONS IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT, AS INTERPRETED BY A MAJORITY OF THE CIRCUITS.

In its Post-Judgment Memorandum Opinion and Order, the district court in the present case awarded

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Footnote continued—

Such disproportionality also exists in the present case. Murphy recovered $10,000 in compensatory damages plus an amount in back wages which is anticipated to be less than $30,000, although yet to be determined by the district court. The injunctive relief granted was largely personal to Murphy. Nonetheless, there was an award of attorney fees in excess of $133,000.

$33,107.50 for work performed by Mr. Stege and $100,232.50 for work performed by Mr. Ruben, for every minute of time they submitted.[4] The only reduction in the amount of fees requested by respondent's attorneys, was the district court's reduction in Mr. Ruben's hourly rate of $85 per hour for the years 1975-1976. The court reduced Ruben's rate to $80 per hour.

In making its award, the district court refused to adjust the attorney fees assessed to reflect any duplicative time between the attorneys' pre-litigation and non-litigation time, any time spent litigating unsuccessful claims, or the failure to submit contemporaneously kept and prepared time records. In non-litigation time, labeled as "office" time, attorney Stege submitted 341 hours and attorney Ruben submitted 1030 hours. Litigation time, including depositions, was assessed at 141 hours for attorney Stege and 204.5 hours for attorney Ruben. No consideration was given to assessing different rates for office time as opposed to litigation time. The district court also failed to adjust for clear duplication between the attorneys in office time, as well as trial preparation and trial appearances.

Furthermore, both the district court and the Sixth Circuit Court of Appeals refused to apply any factors beyond the basic "lodestar" consideration of hours spent multiplied by a reasonable hourly rate. This approach conflicts with decisions in every other circuit.

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4. The district court's attorney fee award, was based in part on 42 U.S.C. § 1988 and the bad faith exception to the American Rule. The Sixth Circuit negated the statutory fee basis by rejecting Murphy's § 1983 claims and the bad faith fee basis by holding that there was no bad faith during the course of the litigation. *Murphy,* Nos. 82-3702 and 82-3747, at pp. 22, 26, A-487, A-491.

A. The Sixth Circuit Incorrectly Relied On Northcross, An Opinion Unprecedented Among The Circuits And Directly Conflicting With The Positions Of Every Other Circuit

There is no uniform approach for calculating fair and reasonable attorney fees under either a statutory award of fees or fees awarded on an equitable basis. However, the approach taken by the Sixth Circuit is contrary to any other circuit's approach. One approach is best illustrated by the Fifth Circuit case, *Johnson v. Georgia Highway Express*,[5] and cases following the *Johnson* approach.

Under *Johnson*, 12 factors must be at least considered by the district court before an award of attorney fees can be made. These include: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the legal skill required to perform the legal services; (4) the preclusion of other employment due to the acceptance of the case; (5) the customary fee; (6) the contingent or fixed nature of the fee;[6] (7) the time limitations imposed by the client or the case; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature of the professional relationship with the client; and (12) awards in similar cases. Under *Johnson*, the number of hours and the reasonable hourly rate have no more significance than any of the other factors.

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5. 488 F.2d 714 (5th Cir. 1974).

6. Had the nature of the fee agreement in the instant case been examined, the court would have been cognizant that there was no attorney fee liability on behalf of the plaintiff, to either his Legal Aid Society attorney or his private attorney, to be spread proportionately among the members of the group benefitting from the litigation.

A second approach to awarding reasonable fees is the "lodestar" analysis first articulated in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary* 87 F.2d 161 (3d Cir. 1973) ("Lindy I") and *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3d Cir. 1976) ("Lindy II"). The "lodestar" is composed of the number of hours reasonably expended on the case multiplied by a reasonable hourly rate. Under the strictest "lodestar" approach the "lodestar" figure may be adjusted upward or downward in rare instances to reflect only the contingent nature of success and/or the quality of work performed. The basic lodestar approach articulated by the Third Circuit, has been criticized by the Third Circuit, among others, and has been modified.[7]

Another method of calculating fees combines the lodestar method with the *Johnson* factors. The lodestar calculation is a starting point for calculating the fees. Once the lodestar figure is determined, the *Johnson* factors are applied in order to adjust the lodestar calculation upward or downward.[8] Even courts following a stricter

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7. *See*, for example, Report of the Third Circuit Task Force on Court Awarded Attorney Fees dated October 8, 1985, contained in 771 F.2d No. 2.

8. *Second Circuit*: *McCann v. Coughlin*, 698 F.2d 112 (2d Cir. 1983).

Fourth Circuit: *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978) (The award of attorney fees under the Truth in Lending Act was vacated because the court did not analyze the twelve *Johnson* factors); *In re Mid-Atlantic Toyota Anti-trust Litigation*, 605 F. Supp. 440 (D. Md. 1984); *Brewster v. Pike*, 608 F. Supp. 1163 (D.C. Va. 1985); *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D.C. Md. 1985) (*Hensley* requires that upon determining lodestar amount the *Johnson* factors are to be applied).

Fifth Circuit: *Copper Liquor, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (Three-part analysis to be used:

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first the two lodestar factors are to be determined and multiplied, and then the *Johnson* factors must be applied to determine whether to adjust that amount); *Williams v. Thomas*, 692 F.2d 1032 (5th Cir. 1982) (award of attorney fees under § 1988 requires the district court to engage in the three-part analysis of *Copper Liquor*, including consideration of *Johnson* factors); *Davis v. West Community Hosp.*, 755 F.2d 455 (5th Cir. 1985) (Attorney fees award under § 1988 must include the analysis under *Hensley v. Eckerhart* and award remanded to consider extent of success subsequent to the appeal); *Stewart v. Lubbock County, Tex.*, 767 F.2d 153 (5th Cir. 1985) (Standards enunciated in *Hensley* include consideration of *Johnson* factors); *Mandhare v. LaFargue Elementary School*, 605 F. Supp. 238 (E.D. La. 1985).

Seventh Circuit: *Bonner v. Coughlin*, 657 F.2d 931 (7th Cir. 1981) (In determining the amount of attorney fees to be awarded under § 1988, the eight factors set forth in the Code of Professional Responsibility, Disciplinary Rule 2-106 must be considered, as well as other factors); *State of Ill. v. Sangamo Const. Co.*, 657 F.2d 855 (7th Cir. 1981) (The district court must consider the lodestar amount and then may adjust that amount upon a consideration of factors listed in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) which are basically same as *Johnson* factors); *Lynch v. City of Milwaukee*, 747 F.2d 423 (7th Cir. 1984) (In § 1988 action, under *Hensley* the *Johnson* factors considered to determine "reasonableness" in lodestar or applied upon determination of lodestar).

Eighth Circuit: The following cases require that the *Johnson* factors be considered in order to determine whether the basic lodestar amount should be adjusted: *Ladies Ctr., Nebraska, Inc. v. Thone*, 645 F.2d 645 (8th Cir. 1981) (§ 1988 fee award); *Jaquette v. Black Hawk County, Iowa*, 710 F.2d 455 (8th Cir. 1983) (§ 1988 fee award); and *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985) (The *Johnson* guidelines adopted by this court must be considered either in the initial calculation of the reasonableness of the lodestar amounts or in determining whether to adjust the lodestar figure); *Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236 (8th Cir. 1982).

Ninth Circuit: *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 839-840 (9th Cir. 1982) (The award of attorney fees under the Sherman Anti-Trust Act must entail consideration of amount of time spent on unsuccessful claims, as well as a "blending" of the lodestar calculation and the *Johnson/Kerr* factors); *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983).

Tenth Circuit: *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (As in *Hensley*, starting point in statutory fee determination is the lodestar figure, distinguishing "raw" time from "billable" time, considering duplication and amounts listed for spe-

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lodestar approach have applied other factors bearing on the fee award, as set forth in the margin.[9]

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cific tasks, contemporaneous time records and results obtained as well as other *Johnson* factors); *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D.C. Colo. 1984) (Extensive review of the method of calculating attorney fees, lending support for using lodestar calculation as the starting point and the *Johnson* factors are considered and sometimes applied to adjust the lodestar amount).

Eleventh Circuit: *Marion v. Barrier*, 694 F.2d 229 (11th Cir. 1982) (*Johnson* factors upheld and are to be balanced in § 1988 case); *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530 (11th Cir. 1983) (In determining attorney fees under § 1988, the extent of success is crucial and factors must be considered in addition to reasonable hourly rate and reasonable fees); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586 (11th Cir. 1984) (In age discrimination case, the determination of the reasonableness of lodestar figure, must include a review of the *Johnson* factors); *Varner v. Century Finance Co., Inc.*, 738 F.2d 1143 (11th Cir. 1984) (A district court award in attorney fees under Truth in Lending Act, must consider *Johnson* factors that are litigated); *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985) (The lodestar determination is a reasonable starting point in determining fees under the Equal Access to Justice Act, and the other *Johnson* factors must be considered to determine whether there must be an adjustment to the lodestar, citing *Hensley* at 433-34, *Jones* at 588-89, and *Varner* at 1148); *Curry v. Block*, 608 F. Supp. 1407 (D.C. Ga. 1985).

9. *First Circuit*: *Furtado v. Bishop*, 635 F.2d 915 (1st Cir. 1980) (Two steps to the analysis involve determining the "lodestar" and adjusting that amount to reflect the contingent nature of the fee, delay in payment, quality of representation, exceptional results obtained, and other factors enunciated in the *Copeland* case); *Souza v. Southworth*, 564 F.2d 609 (1st Cir. 1977) (District court incorrectly multiplied numbers of hours by market rate without regard to significance or complexity of the litigation and with the incorrect assumption that every hour was billable at the same rate); *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78 (1st Cir. 1984) (Once the lodestar is determined, it may be adjusted as delineated in the *Furtado* and *Copeland* cases); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984) (The "lodestar" is merely a "point of reference" obtained by considering number of hours actually spent less any duplicative, unproductive, excessive, or otherwise unnecessary hours, as well as the type of work performed, who performed it, the expertise required and when it was undertaken. That amount is then

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In the present case both the district court and the Sixth Circuit Court of Appeals relied on the Sixth Circuit case, *Northcross v. Board of Education of Memphis City Schools*,[10] as support for refusing to apply any factors beyond the basic lodestar calculation. The Sixth Circuit in *Northcross* established guidelines for awarding attorney fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976.[11] The *Northcross* court decided that once the prevailing party was determined:

> . . . [t]hey are entitled to recover attorneys' fees for 'all time reasonably spent on a matter'. The fact that some of that time was spent in pursuing issues or research which was ultimately unproductive, re-

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adjusted by the factors enumerated in *Furtado* and *Copeland*); *Hart v. Bourque*, 608 F. Supp. 1091 (D.C. Mass. 1985).

Second Circuit: *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977).

Third Circuit: *Bagby v. Beal*, 606 F.2d 411, 416 (3d Cir. 1979) (In § 1988 fees case, to determine reasonableness of award, *Johnson* factors must be considered); *Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177 (3d Cir. 1983) (*Hensley* requires an evaluation of the interrelationship between successful and unsuccessful claims and thus the extent of success and amount of the fee award); *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985); *Hummel v. Brennan*, 83 F.R.D. 141 (E.D. Pa. 1979) (Attorney fees awarded, based on *Hall v. Cole* by determining lodestar and then applying nine factors found in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974).)

D.C. Circuit: *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*) (Although the *Johnson* factors are central to any fee award, the lodestar is the starting point and it is adjusted by contingent nature of success and quality of representation, including the extent of success. Hours not included if spent on non-productive time, time spent on unsuccessful claims, or duplicative time); *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

10. 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

11. 42 U.S.C. § 1988 (1976).

> jected by the court, or mooted by intervening events is wholly irrelevant. *So long as the party has prevailed on the case as a whole the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith.*[12]

The district court in the present case, based on *Northcross*, stated:

> Having reviewed the affidavits of attorneys Stege and Ruben, this Court concludes that they neither claimed unjustified hours nor duplicated each other's services. This Court will neither deduct hours for cause nor arbitrarily deduct a small percentage of the total hours for duplication of services. This Court finds that the hours for which attorneys Stege and Ruben are entitled to compensation are accurately summarized in the above chart.[13]

The chart referred to by the court merely listed the number of hours each attorney had devoted to "office" matters and to "litigation". The district court did not consider applying different rates for office time, trial preparation or litigation time. The court also failed to adjust for clear duplication between the attorneys in office time, duplicative trial preparation and briefs, as well as duplication in trial appearances. Proof of contemporaneous time records was not required by the court.[14]

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12. 611 F.2d at 636. (Emphasis added.) *See also, Stewart v. Rhodes*, 656 F.2d 1216 (6th Cir. 1981); *Louisville Black Police Officers v. City of Louisville*, 700 F.2d 268 (6th Cir. 1983).

13. Post-Judgment Memorandum Opinion and Order, p. 19, A-419, 420.

14. For examples of cases requiring contemporaneous time records, *see Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st

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The Sixth Circuit, in the present case, did not condone an award of attorney fees on either a statutory fee basis or bad faith basis.[15] Instead, the Sixth Circuit condoned the award of fees under the common benefit rationale,[16] citing the following language of this Court in *Hensley v. Eckerhart*:

> The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. *See Copeland v. Marshall*, 205 U.S. App.D.C. 390, 400, 641 F.2d 880, 890 (1980) (*en banc*).[17]

Referring to the *Johnson* case, the Sixth Circuit further stated:

> In *Northcross*, the Sixth Circuit expressly rejected this checklist approach to fee determinations. Instead the Sixth Circuit held that a district court need only consider the hours of service provided (and whether those hours were reasonable under the circumstances) and a reasonable rate of compensation. 611 F.2d at 636-39. The Sixth Circuit found that such an approach

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Cir. 1984); *New York Ass'n For Retarded Children v. Carey*, 711 F.2d 1136, 1148 (2d Cir. 1983); *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983); and *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1327 (D.C. Cir. 1982).

15. *Murphy*, Nos. 82-3702 and 82-3747, at pp. 21, n.7 and 22, A-486, A-487.

16. *See infra*, pp. 21-26.

17. *Murphy*, Nos. 82-3702 and 82-3747, at p. 24, A-489, citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983).

'will take into account all the relevant factors, and will lead to a reasonable result'. *Id.* at 642.[18]

Thus, under the Sixth Circuit approach, once the lodestar amount is determined, the district court need only consider whether the positions asserted are frivolous or in bad faith. In so holding, the Sixth Circuit's position is contrary to that taken by every other circuit.[19]

The Court should take this opportunity to resolve the conflict among the circuits and to clarify the factors to be considered in making a reasonable and fair attorney fee award under exceptions to the American Rule. The existence of the conflict among the circuits and this Court's recent decision to review the factors involved with another attorney fee award[20] strongly suggests that the time is ripe for a decision by this Supreme Court on this issue.

B. The Sixth Circuit's Attorney Fees Holding Conflicts With Prior Decisions Of The Supreme Court, As Interpreted By A Majority Of The Circuits

The Sixth Circuit stated in the present case, that this Court's decision in *Hensley v. Eckerhart*, 461 U.S. 424 (1983) neither approved the application of the *Johnson* factors nor disapproved the Sixth Circuit approach in *Northcross*. The *Northcross* court, followed in the present case, opined that, "So long as the party has prevailed as a whole the district courts are to allow compensation for

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18. *Murphy*, Nos. 82-3702 and 82-3747, at p. 24, A-489.

19. *See supra*, pp. 12-15.

20. *City of Riverside v. Rivera*, 763 F.2d 1580 (9th Cir. 1985), *cert. granted*, No. 85-224. Also pending is a petition for certiorari in *City of McKeesport v. Cunningham*, 753 F.2d 262 (3d Cir. 1985), *petition for cert. filed*, No. 84-1793.

hours expended on unsuccessful research or litigation, unless the positions asserted are frivolous or in bad faith."[21]

Contrary to the position taken by the Sixth Circuit, a majority of the circuits have interpreted *Hensley* in determining a reasonable fee award, as providing that although such an award begins with the lodestar calculation, the lodestar does not end the analysis. Other factors may, and in some cases must be considered, according to this interpretation of *Hensley*,[22] and the *Johnson* factors may be used to modify the award.[23] In addition, the

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21. 611 F.2d at 636.

22. Cases interpreting *Hensley* in this manner include:

First Circuit: *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984); *Segal v. Gilbert Color Systems, Inc.*, 746 F.2d 78 (1st Cir. 1984); *Hart v. Bourque*, 608 F. Supp 1091 (D.C. Mass. 1985).

Third Circuit: *Institutionalized Juveniles v. Sec. of Pub. Wel.*, 758 F.2d 897 (3d Cir. 1985).

Fourth Circuit: *Brady v. Hartford Fire Ins. Co.*, 610 F. Supp. 735 (D.C. Md. 1985).

Fifth Circuit: *Stewart v. Lubbock County, Tex.*, 767 F.2d 153 (5th Cir. 1985).

Seventh Circuit: *Ohio-Sealy Mattress Manuf. Co., et al. v. Sealy, Inc., et al.*, Case Nos. 84-2886 and 84-2926 (7th Cir., Oct. 21, 1985); *Lynch v. City of Milwaukee*, 747 F.2d 423 (7th Cir. 1984).

Eighth Circuit: *Tusa v. Omaha Auto Auction, Inc.*, 712 F.2d 1248 (8th Cir. 1983); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985).

Ninth Circuit: *White v. City of Richmond*, 713 F.2d 458 (9th Cir. 1983).

Tenth Circuit: *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D.C. Colo. 1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983).

Eleventh Circuit: *Watford v. Heckler*, 765 F.2d 1562 (11th Cir. 1985); *Jones v. Central Soya Co., Inc.*, 748 F.2d 586 (11th Cir. 1984); *Yates v. Mobile County Personnel Bd.*, 719 F.2d 1530 (11th Cir. 1983); *Curry v. Block*, 608 F. Supp. 1407 (D.C. Ga. 1984).

D.C. Circuit: *Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984).

23. *See supra*, footnote 9, p. 15.

Hensley case has been interpreted to require consideration of the extent of plaintiff's success, in order to determine whether reduction for partial success is in order.[24] To the contrary, the Sixth Circuit in the present case refused to read *Hensley* as requiring consideration of the "results obtained" *Johnson* factor.[25]

Further support for interpreting *Hensley* as approving the application of the *Johnson* factors can be found in footnote 8 of the concurring and dissenting opinion of Justices Brennan, Marshall, Blackmun and Stevens in *Hensley,* where the Justices state that the court had expressly approved the *Johnson* factors.[26]

III. THE SIXTH CIRCUIT'S ATTORNEY FEES DECISION, RELYING ON STATUTORY FEE CASES, DISREGARDED THE ESSENTIAL DIFFERENCES BETWEEN FEES BASED ON THE COMMON BENEFIT RATIONALE AND STATUTORY FEE AWARDS, AND THUS CONFLICTS WITH THIS COURT'S PRIOR COMMON BENEFIT OPINIONS.

The longstanding American Rule prohibiting an award of attorney fees to a prevailing party in the absence of

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24. *See Inmates of Allegheny County Jail v. Pierce,* 716 F.2d 177 (3d Cir. 1983); *Institutionalized Juveniles v. Sec. of Pub. Wel.,* 758 F.2d 897 (3d Cir. 1985) (The district court must, under *Hensley,* consider the relationship between the extent of success and the amount of the fee award); *Davis v. West Community Hosp.,* 755 F.2d 455 (5th Cir. 1985) (Although the district court properly considered the relationship between the extent of success and the fee award, remanded in view of lesser success after appeal); *Tusa v. Omaha Auto Auction, Inc.,* 712 F.2d 1248 (8th Cir. 1983); *Watford v. Heckler,* 765 F.2d 1562 (11th Cir. 1985).

25. *Murphy,* Nos. 82-3702 and 82-3747, at pp. 23, 24, A-488, A-489.

26. 461 U.S. at 55.

a statute or contract providing for such an award, has been regularly reaffirmed by the Supreme Court in numerous decisions.[27]

Several narrow exceptions have been judicially carved out of the American Rule, including the "bad faith"[28] exception and the "common benefit" exception. This Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) set forth the present day formulation in LMRDA cases of the "common benefit" exception recognized in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

In *Mills*, this Court extended the earlier "common fund" rationale, under which one who initiates a lawsuit resulting in the creation of or increase in a fund in which others have a common interest, to allow reimbursement from the fund for litigation expenses incurred. This Court in *Mills* allowed an award of attorney fees to a plaintiff whose litigation conferred a non-pecuniary benefit on others, reasoning that the plaintiff's lawsuit "[h]as conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them."[29]

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27. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

28. The Sixth Circuit in the present case rejected the district court's award of fees under the "bad faith" theory, citing *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied*, 105 S.Ct. 1191 (1985) as allowing a "bad faith" award only for bad faith during the course of the litigation. The "private attorney general" exception was overruled by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

29. 396 U.S. at 393-94.

In *Hall v. Cole*,[30] this Court held that the plaintiff, by vindicating his own right to free speech, rendered a substantial service or "common benefit" to the Union as an institution, and to all of its members. More specifically, this Court provided for the common benefit exception where a plaintiff confers:

> "[a] substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills v. Electric Auto-Lite, supra*, at 393-394. "Fee-shifting" is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly *at the plaintiff's expense*." *Id.*, at 392; *see also Fleischmann Distilling Corp. v. Maier Brewing Co., supra*, at 719, *Trustees v. Greenough*, 105 U.S. 527, 532 (1882).[31]

The Sixth Circuit in the present case held that attorney fees were only to be awarded under the common benefit exception to the American Rule, rejecting the bad faith and statutory fee bases.

Attorney fees would have also been precluded under the common benefit rationale, if the Union had not voluntarily expended a great deal of time and money to develop a new referral system plan. As a result of the Union's efforts, the district court vacated the punitive damage award previously assessed against the Union.

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30. 412 U.S. 1 (1973).

31. 412 U.S. at pp. 5-6 (Footnotes omitted.) (Emphasis added.)

Had the Union instead chosen to pay the punitives, the group would have not have been benefitted in the same manner as *Murphy* and common benefit fees would have been precluded under *Shimman v. International Union of Operating Engineers, Local 18.*[32] Curiously, the voluntary action of the Union served to penalize the membership. This resulted from the Sixth Circuit's incorrect reliance on statutory fee cases, while at the same time precluding recovery under § 1985 (3), without further consideration as to the necessity for applying additional factors in common benefit fee award cases.

This Court has not directly considered whether its decisions in *Hensley v. Eckerhart*[33] and *Blum v. Stenson*[34] are applicable to common benefit cases, and whether additional factors must be considered in common benefit cases. However, this Court has recognized the distinction between statutory fee cases and equitable fee cases.[35]

Unlike statutory fee cases which shift the attorney fees to the unsuccessful litigant and calculate a reasonable fee by measuring the amount of attorney time reasonably expended, common benefit attorney fees must be calculated so as to spread proportionately among the membership of the class benefitting from the plaintiff's acts, the plaintiff's litigation expenses, in order to avoid unjust enrichment on the part of those who benefitted at the plaintiff's expense.[36] In cases decided under the equitable doctrine, the parties paying the fee award are not before

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32. 744 F.2d 1226 (6th Cir. 1984) (*en banc*), *cert. denied*, 105 S. Ct. 1191 (1985).

33. 461 U.S. 424 (1983).

34. ..... U.S. ....., 79 L. Ed. 2d 891, 104 S. Ct. ..... (1984).

35. *Blum*, 79 L. Ed. 2d at 903.

36. *See supra*, pp. 21, 22.

the court, as in statutory fee cases, necessitating a heightened fiduciary role by the judge on behalf of the beneficiaries.[37]

Public policy considerations in statutory fee cases are distinct from common benefit cases. This Court in *Alyeska Pipeline Service Co. v. Wilderness Society,* rejected the application of an equitable basis for an attorney fee award when a plaintiff acted as a "private attorney general", ruling that the authorization for such fee awards must be granted by Congress.[38] In response to that ruling, Congress enacted the Civil Rights Attorneys' Fees Awards Act of 1976.[39] It has been stated that:

> Civil rights plaintiffs with meritorious claims "appear before the court cloaked in a mantle of public interest."[40]

Congress asserted that the public as a whole has an interest in the vindication of civil rights. While in the past courts used the common benefit exception to extend the American

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37. *See Blum,* 79 L. Ed. 2d at 903 and Report of the Third Circuit Task Force on Court Awarded Attorney Fees, dated Oct. 8, 1985, contained at 771 F.2d No. 2 at p. 20 and at p. 25 the following appears:

> Upon reflection, the Task Force agreed that the fundamental differences between statutory fee and fund-in-court cases should be recognized in the fee setting process. Treating these two categories of cases in variant ways to best achieve their policy objectives appear sound especially in light of footnote 16 of Justice Powell's opinion in *Blum v. Stenson,* quoted earlier. (Footnotes omitted.)

38. *Northcross v. Board of Ed. of Memphis City Schools,* 611 F.2d 624, 632 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980), citing *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975).

39. 42 U.S.C. § 1988 (1976); *Hensley v. Eckerhart,* 461 U.S. at 56 (dissenting opinion).

40. *Hensley,* 461 U.S. at 57, citing H.R. Rep. No. 94-1558, p. 6 (1976).

Rule further under the "private attorney general" theory to award fees to plaintiffs vindicating important statutory rights of the public as a whole,[41] such an approach was rejected in *Alyeska*. *Alyeska* did, however, approve the common benefit rationale applied in *Mills* and *Hall*, to prevent unjust enrichment at the plaintiff's expense. Clearly, in so holding, this Court recognized the distinction in the rationale behind the two approaches.

In the present case, the same rationale used in statutory fees cases wherein there is express Congressional purpose for an award of fees was incorrectly applied to a common benefit case with no consideration of additional factors in calculating the amount of the fees. The Sixth Circuit permitted the respondent to succeed as he would have under the private attorney general theory, while nonetheless designating the relief as that granted under the common benefit rationale.[42] This merger was accomplished by the Sixth Circuit, contrary to this Court's rationale in *Alyeska, Mills* and *Hall*. It is essential that this Court clarify the Sixth Circuit's fallacious determination.

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41. *See Hoitt v. Vitek*, 495 F.2d 219 (1st Cir. 1974); *Cornist v. Richland Parish School Board*, 495 F.2d 189 (5th Cir. 1974), *modified*, 517 F.2d 1032 (5th Cir. 1975); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974), *reversed sub nom., Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

42. As the Sixth Circuit stated in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 1191 (1985):

> Society as a whole always benefits through general deterrence when the law is enforced. Allowing a fee award based on such benefits, however, would come close to accepting the "private attorney general" rationale, which was rejected by the Supreme Court in *Alyeska*. *The common benefit theory should not be allowed to merge into the private attorney general approach. Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir.), *cert. denied*, 423 U.S. 928, 96 S. Ct. 276, 46 L. Ed. 2d 256 (1975). (Emphasis added.)

IV. THE SIXTH CIRCUIT ERRONEOUSLY AFFIRMED THE DISTRICT COURT'S ABUSE OF DISCRETION IN DIRECT CONFLICT WITH CASES IN EVERY OTHER CIRCUIT AND WITH PRIOR DECISIONS OF THIS COURT BY AWARDING OVER $133,000 IN ATTORNEY FEES UNDER THE "COMMON BENEFIT" RATIONALE, ALTHOUGH BY CONTRACT THE PLAINTIFF OWED NO FEES TO HIS PRIVATE ATTORNEY OR TO HIS LEGAL AID ATTORNEY RESULTING IN THE PLAINTIFF INCURRING NO COSTS OF THE LITIGATION TO BE SPREAD PROPORTIONATELY AMONGST THE MEMBERSHIP OF THE CLASS ALLEGEDLY BENEFITTING FROM THE LITIGATION.

In the instant case, the Sixth Circuit held that attorney fees were properly awarded by the district court, only under the common benefit exception to the American Rule. The court thus rejected the district court's award of fees under the bad faith exception and under 42 U.S.C. § 1988. In placing its imprimatur on such a common benefit award, the Sixth Circuit stated:

> Here, on the other hand, without the award of attorneys' fees, Murphy will receive *no* punitive damages and only $10,000 and lost wages in compensatory damages. *Thus, without the attorneys' fee award, Murphy would suffer significant financial loss for litigating a suit that resulted in substantial benefit to the Union as a whole.*
>
> On these two bases we believe that the amount of attorneys' fee award in Murphy's favor is fully

justified upon a "common benefit" theory.[43] (Emphasis added.)

The appeals court apparently relied on Mr. Ruben's statement in his Supplemental Brief of Plaintiff-Appellee/Cross-Appellant at page 14:

> In the instant proceeding Defendants seek to escape from having to pay either punitive damages or counsel fees, and unfairly shift the burden entirely to Plaintiff Murphy to pay his attorneys out of the $10,000 compensatory damage award and whatever amount of back pay the District Court may allow.[44]

The record in this case, establishes, however, that respondent Murphy signed a power of attorney, granting private attorney Ruben full decision making authority in the instant action, and further stating:

> In no event shall I be personally responsible for attorneys' fees or any other charges, costs and expenses which may accrue in the course of litigation or in the performance of any other service hereunder.
>
> All charges, costs and other expenses will be defrayed through subventions from the American Civil Liberties Union and the Legal Aid Society of Cleveland.

The attorneys were also authorized as follows:

> To maintain a bank account for the deposit of money damages and the remission of aforesaid fine paid by myself.[45]

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43. *Murphy*, Nos. 82-3702 and 82-3747, at p. 23, A-488.

44. Supplemental Brief of Plaintiff-Appellee/Cross-Appellant, p. 14, A-507.

45. *See* Supplemental Affidavit in Support of Plaintiff's Request For Counsel Fees, pp. 2, 3, A-509.

Based on the above agreement, the plaintiff below argued that although Murphy had no financial obligation to his attorneys, they were empowered to seek an award of counsel fees and costs against the defendants. Mr. Ruben distinguished himself from Legal Aid attorney Stege because he was not obligated to remit any fees awarded to him.[46]

The Sixth Circuit's refusal to consider any factors in addition to the number of hours spent multiplied by a reasonable hourly rate, precluded the consideration of the nature of the fee agreement between Murphy and his attorneys. Thus, the award of attorney fees in the present case, allowing attorney fees under the common benefit rationale where the plaintiff owes no fees to his private attorney is contrary to this Court's previous decisions in *Mills v. Electric Auto-Lite Co.*,[47] and *Hall v. Cole*,[48] because this is not an instance in which the Union members will be unjustly enriched at the plaintiff's expense. The respondent did not cite below, and petitioner has been unable to obtain, any case authorizing a common benefit award of attorney fees to a plaintiff who owes no fees to his private attorney. Thus, it is essential that this Court clarify the unsupportable decision of the Sixth Circuit, which directly opposes this Court's decisions.

The same reasoning applies to the award of attorney fees to Legal Aid attorney Stege. The district court refused to deny attorney fees to a Legal Aid Society attorney, citing *Incarcerated Men of Allen County Jail v. Fair*,[49] a 1974 case

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46. *See* Reply to Defendants' Brief in Opposition to Plaintiff's Motion For Counsel Fees, p. 11, A-517.

47. 396 U.S. 375 (1970).

48. 412 U.S. 1 (1973).

49. 507 F.2d 281 (6th Cir. 1974) (The court expressed doubts as to the applicability of the "common benefit" theory to the case). *See* Post Judgment Memorandum Opinion and Order, p. 15, A-411, A-412.

brought pursuant to 42 U.S.C. § 1983 but decided prior to the enactment of 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Award Act of 1976 and prior to this Court's rejection of the "private attorney general" theory in *Alyeska Pipeline Service Co. v. Wilderness Society.*[50] *Incarcerated Men* is inapplicable to the instant case, because prevailing plaintiffs in cases brought pursuant to 42 U.S.C. § 1983 are now entitled to congressionally mandated attorney fees. The cases cited by the plaintiff below as supporting a fee award to Legal Aid Society attorneys were all statutory fee award cases.

Cases involving awards of attorney fees to Legal Aid Society attorneys pursuant to statutes cannot be cited to award fees under the common benefit rationale. While in common benefit cases, the court must exercise its power in a manner consistent with preventing unjust enrichment to the detriment of the plaintiff, in statutory fee cases attorney fees are awarded to further the congressional purpose of promoting full enforcement of the substantive rights upon which the fee awards are based.[51] Awarding fees under the common benefit rationale where a plaintiff is not responsible for fees to his attorneys and without a specific statute for such award, based on the benefit

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50. 421 U.S. 240 (1975).

51. *See* Berger, *Court Awarded Attorneys' Fees: What is 'Reasonable'?*, 126 U.PENN.LAW REV. 281, 283 (1977). For cases holding that in furtherance of the underlying legislative intent of 42 U.S.C. § 1988, attorney fees for public interest attorneys and private firm lawyers should be calculated the same, *see Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980) (*en banc*); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.), *cert. denied*, 449 U.S. 839 (1980); *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1978); *Love v. Mayor of Cheyenne*, 620 F.2d 235 (10th Cir. 1980); *Ramos v. Lamm*, 713 F.2d 546, 551 (10th Cir. 1983) (Senate Report accompanying § 1988 cited two cases requiring same calculations for private and public interest attorneys).

conferred on the membership, would require a return to the "private attorney general" exception to the American Rule already rejected by this Court in *Alyeska*.

A decision by this Court is essential to clarify this misapplication of the statutory provisions allowing attorney fees for Legal Aid Society attorneys to cases based on the common benefit rationale.

CONCLUSION

Petitioner urges this Court to grant this petition, in order to eliminate the conflicts and confusion created by the Sixth Circuit's attorney fees decision based on the common benefit rationale.

Respectfully submitted,

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